83-5406

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

TIMOTHY DALE BUNCH,

Petitioner

v.

COMMONWEALTH OF VIRGINIA,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

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CONSTITUTIONAL PROVISIONS AND STATUTES:

United States Constitution
Eighth Amendment

United States Constitution
Fourteenth Amendment

Virginia Code §19.2-264.2 (1950)

QUESTION PRESENTED

I. WHETHER THE IMPOSITION OF THE DEATH SENTENCE UPON PETITIONER ON A FINDING OF THE AGGRAVATING CIRCUMSTANCE THAT THE OFFENSE WAS "OUTRAGEOUSLY OF WANTONLY VILE, HORRIBLE OR INHUMAN IN THAT IT INVOLVED TORTURE, DEPRAVITY OF MIND OR AN AGGRAVATED BATTERY TO THE VICTIM" AS CONSTRUED AND APPLIED BY THE TRIAL COURT AND THE SUPREME COURT OF VIRGINIA IN THIS CASE, VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENT REQUIREMENTS FOR CAPITAL SENTENCING ESTABLISHED BY GODFREY v. GEORGIA, 446 U.S. 420.

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Petitioner, Timothy Dale Bunch, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Virginia in this case.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Virginia is reported at Va. , S.E.2d (1983) and is attached hereto as Appendix A.

JURISDICTION

The judgment of the Supreme Court of Virginia was entered on June 17, 1983. No petition for rehearing was filed. Justice Brennan granted petitioner's motion for extension of time to file this petition to and including September 15, 1983. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3), petitioner having asserted below and asserting herein deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth Amendment to the Constitution of the United States, which provides:

> Excessive bail shall not be required nor excessive fines imposed nor cruel and unusual punishment inflicted.

and the Fourteenth Amendment to the Constitution of the United States which provides in relevant part:

> [N]or shall any state deprive any person of life, liberty or property without due process of law. . . .

2. This case also involves the following provisions of the Statutes of Virginia:

Virginia Code §18.2-21(d) (1950), as amended:

> The following offenses shall constitute capital murder, punishable as a Class I felony:
>
> * * *
>
> (d) The willful, deliberate and premeditated killing of any person in the commission of robbery while armed with a deadly weapon;
>
> * * *

Virginia Code §19.2-264.2 (1950), as amended:

> Conditions for imposition of death sentence. In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) ... [find] that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed.

STATEMENT OF THE CASE

Petitioner seeks a writ of certiorari from this Court to the Supreme Court of Virginia to review a decision of that court upholding his conviction and sentence of death.

Petitioner, a 23 year old sargeant and correctional specialist in the Marine Corps at the time of these offenses, had no prior criminal record. He was convicted of the capital murder of another person, Su Cha Thomas. The jury recommended a sentence of death solely upon the existence of one of the statutory circumstances in Virginia, Va. Code §19.2-264.2 (1950), as amended, that is, that his conduct was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim." (The "vileness" aggravating circumstance.)

The offense occurred on January 31, 1982 at the home of Mrs. Su Cha Thomas. Petitioner had been involved in a relationship with Mrs. Thomas since December, 1981. On this evening they were preparing to go out. Petitioner, not having the money to pay for the evening, was feeling tension and conflict. They began to play a game of "hide and seek." After Mrs. Thomas found petitioner and turned to leave, petitioner pulled out his gun and fired one shot. Mrs. Thomas fell to the floor and "undoubtedly would have been unconscious during most or all of that time [until death]." [1/] Tr. I at 179-180.

After firing the shot, petitioner felt in "total disarray" and contemplated putting the gun to his own head. Tr. II 91. He turned on the stereo and walked around the house aimlessly for about an hour. Tr. II at 91.

1/ As the trial proceedings took several days, the following will be used to refer to various transcripts: Tr. I -- transcript from August 9, 1982; Tr. II -- transcript from August 10, 1982; Tr. III -- transcript from August 11, 1982; Tr. IV -- transcript from November 12, 1982.

At that point, petitioner thought it would look better if he took something and he located some of her jewelry and other items. He then tied a scarf around her neck and tied it to the door to look as if she had committed suicide. Tr. II at 94.

The medical examiner determined that the cause of death was the gunshot wound to the head with a secondary complication, asphyxiation by hanging. Tr. I at 183. He testified that while the wound was fatal, an individual sustaining only this wound could have survived for an hour to two hours. Tr. I at 179. He further testified that the hanging would have accelerated the period of time to cause her death. Tr. I at 180.

The body of Mrs. Thomas was found on February 2, 1982. On February 16, 1982, Mr. Bunch was arrested in Iwakuni, Japan where he was stationed in the military and brought back for trial. The government presented various pieces of circumstantial evidence linking petitioner to the crime as well as incriminating statements made by him to the police.

The defense presented only the testimony of petitioner. He admitted to the shooting but tried to explain many of the pressures and conflicts he had been feeling at that time, primarily associated with his depression over his inability to reconcile his relationship with his wife.

The jury returned a verdict of guilty of capital murder and use of a firearm in the commission of a felony. Following the verdict a sentencing hearing was held. The state presented two brief witnesses who testified about petitioner's interest in guns, the military and mercenaries. The defense presented petitioner's mother. The jury was instructed that if they found that the Commonwealth had proved beyond a reasonable doubt that the defendant's conduct was outrageously or wantonly vile, horrible or inhuman, then they must fix the punishment at death. Tr. III at 143. The jury returned a sentence of death.

A hearing was held on November 12, 1982 before the trial judge for review of the pre-sentence report and the imposition of sentence. The pre-sentence report writer testified as to various background information on petitioner. Tr. IV at 2. Dr. Robert Showalter, M.D., a psychiatrist from the University of Virginia, Institute of Law, Psychiatry and Public Policy, testified about his examination and evaluation of the petitioner. Tr. IV at 20. He explained that petitioner was suffering from depressive neurosis (Tr. IV at 28) which intensified when he was unable to reconcile with his wife. At the time surrounding the event he was "deeply depressed," "his own self-image, his interest in life . . . was severely compromised" . . . and . . . his actions to Mrs. Thomas were a form of "passive self-destruction." Tr. IV at 32-33. He testified further that everyone who participated in the evaluation felt that petitioner does "demonstrate a capability for rehabilitation," is "intelligent," has "capability for improved self-insight" and has a "genuine desire to try to clean up the mess of his life." Tr. IV at 34.

The doctor noted that "Timothy was desensitized to the idea of killing and shooting . . . through participation in military training." Tr. IV at 55. He finally concluded that "there is nothing inherent in Mr. Bench's personality that puts him in that category of individuals who are thought to be highly violence prone." Tr. IV at 35.

The Court then sentenced Mr. Bunch to death.

On appeal, the Virginia Supreme Court upheld the sentence of death. The Court found that depravity of mind can exist independently of the presence of torture or aggravated battery and may alone support a finding of vileness as a basis for a sentence of death. (Va. Sup. Ct. Opinion p. 18). The Court was satisfied that the evidence that Mrs. Thomas was hung on the doorknob constituted an "aggravated battery to her person, viz.,

one 'which qualitatively and quantitatively [was] more culpable than the minimum necessary to accomplish an act of murder.'" (Va. Sup. Ct. Opinion at 22). The Court stated that it was not "reversible error for a trial court to refuse to define the statutory terms included in the aggravating circumstances." (Va. Sup. Ct. Opinion at 24).

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

At petitioner's trial a Motion to Quash the murder indictment was filed on July 30, 1982 alleging, inter alia, that the statutory language in the Virginia sentencing statute, Va. Code 19.2-264.2, is so "uncertain, vague, speculative and prone to error on the side of overinclusion that it is meaningless, fails adequately to channel the sentencer's discretion, and is arbitrary." The trial court denied the pre-trial motion.

In his appeal brief, petitioner urged as Assignment of Error No. 3 that the Virginia Capital Murder Sentencing Statute violates the Constitution of the United States by being "overly inclusive" and overbroad. Brief of Appellant at 10. The Virginia Supreme Court rejected this claim, and stated that the statute had previously been upheld against similar attacks. Bunch v. State, supra, ___ Va. at ___, ___ S.E.2d at ___ (citing Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978), cert. denied, 441 U.S. 967 (1979) and LeVasseur v. Commonwealth, 225 Va. ___, ___ S.E.2d ___ (1983)).

ARGUMENT

I. THE IMPOSITION OF THE DEATH SENTENCE UPON PETITIONER UNDER THE "VILENESS" AGGRAVATING CIRCUMSTANCE AS CONSTRUED AND APPLIED BY THE TRIAL COURT AND THE SUPREME COURT OF VIRGINIA IN THIS CASE, VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENT REQUIREMENTS FOR CAPITAL SENTENCING ESTABLISHED BY GODFREY v. GEORGIA.

In Godfrey v. Georgia, 446 U.S. 420 (1980), this Court held that the aggravating circumstance in Ga. Code §27-2534.1(b)(7), that the offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim, cannot be the basis of a constitutional death sentence where no restrictive interpretation is conveyed to the jurors by instructions that "suitably direct and limit" the jury's discretion "so as to minimize the risk of wholly arbitrary and capricious action." Godfrey, 446 U.S. at 427-430. This is especially true where the circumstances are not defined and circumscribed by judicial interpretation on appeal and there is no evidence that the crime involved "torture" or other behavior lying "at the core" of the aggravating circumstance. Id.

In the instant case, the only aggravating circumstance presented to the jury was pursuant to Va. Code Ann. §19.2-264.2 which reads identically to the Georgia statute and has been so recognized by the Virginia Supreme Court.[2/] There was no limiting instruction given by the trial court, and the facts of the case establish that there is no evidence supporting a finding that would come within the statute if constitutionally construed.

This case clearly does not involve torture, aggravated battery or other "core" behavior. There was a single gunshot where the victim died a short time later without ever regaining consciousness. There was no beating or mutilation of the body either before or after the gunshot. The victim was neither physically nor mentally tortured prior to death. Unlike Godfrey, this case does not involve a multiple murder. Nor is

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2/ In Smith v. Commonwealth, supra, the Court acknowledged that the language defining the aggravating circumstance [illegible] is the same as that in the Georgia

there any evidence that the victim was in fear of harm before being shot or that the murder caused "a gruesome spectacle" in the apartment. See 446 U.S. at 433 n.16 (plurality opinion).

Because Mr. Bunch's mental state leading to the murder was not shown to involve a consciousness materially more "depraved" than that of any person guilty of murders, there is no principled way to distinguish this case in which the death penalty was imposed from the many cases in which it was not. Accordingly, petitioner's sentence of death must be reversed.

Although the trial court submitted this aggravating circumstance to the jury, it did not define the terms contained within the statute anywhere in its instructions. 3/ The trial court charged the jury in the words of the statute, which, "standing alone, [implied no] inherent restraint on the arbitrary and capricious infliction of the death sentence." Id. at 428.

By instructing the jury in this manner the trial court failed to "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance' and that 'make rationally reviewable the process for imposing the sentence of death.'" Godfrey, at 428, citing Gregg v. Georgia, 428 U.S. 153, 198, Proffitt v. Florida, 428 U.S. 242, 253 (opinion of Stewart, Powell and Stevens, J.J.) and Woodson v. North Carolina, 428 U.S. 280, 303 (opinion of Stewart, Powell and Stevens, J.J.).

Outside the bare words of the statute, the trial court added only the language that the aggravated battery to the

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3/ The instruction submitted to the jury was as follows:

> Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt that the defendant's conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman in that it involved A, torture; or, B, depravity of mind; or, C, aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder.

Tr. III at 142-143.

victim need be beyond the minimum necessary to accomplish the act of murder. This language, taken from Smith, is constitutionally deficient and therefore raises a question of the propriety of all Virginia death sentences imposed under this portion of the statute. Given the teachings in Godfrey, this Court should further define the Smith construction to require that "physical debasement" and "aggravated battery" be proven by evidence of serious physical abuse before death. The heightened need for reliability in death cases demands the refinement of the Smith construction to a more demonstrative and objective standard. This language does not provide sufficient guidance to the jury as to the meaning of the terms within the statute, nor does it provide the clear and objective standards which allow detailed guidance both to the deliberating jury and for the mandated review process. See Furman v. Georgia, 408 U.S. 238 (1972). Finally, it does not comport with the standard set forth in Godfrey v. Georgia for the identical Georgia statute. The Supreme Court in Godfrey identified three essential criteria to constitutionally limit §(b)(7).

> [T]he phrase, 'depravity of mind,' comprehended only the kind of mental state that led the murderer to torture the victim or to commit an aggravated battery before killing the victim ... [T]he word, 'torture,' must be construed in pari materia with 'aggravated battery' so as to require evidence of serious physical abuse of the victim before death.

Godfrey at 431 (citations and footnotes omitted).

In his dissent in Godfrey, Mr. Chief Justice Burger acknowledges that the plurality grafted a substantive narrowing construction on §(b)(7) by the requirement of "evidence of serious physical abuse," 446 U.S. at 443 (Burger, C.J. dissenting). These guidelines are not merely an interpretation of Georgia state law. Rather, they represent substantive constitutional limits upon the imposition of a death sentence based upon the "vileness" aggravating circumstance. As the